

Development & Commercial Bank Bhd v Aspatra Corp Sdn Bhd & Anor and another appeal A

SUPREME COURT (KUALA LUMPUR) — CIVIL APPEAL NOS 02-497-1992 AND 02-316-1993
 ANUAR CJ (MALAYA), PEH SWEE CHIN AND WAN ADNAN FCJJ B
 21 APRIL 1995

Civil Procedure — *Service* — *Substituted service* — *Whether validity of order can only be challenged in proceedings instituted for that purpose* — *Whether can be challenged collaterally in other proceedings* — *Whether order of registrar considered as order of High Court judge* C

Civil Procedure — *Judgment* — *Setting aside* — *Irregularity in judgment* — *Interest rate of 18%pa for judgment debt* — *Statutory rate of 8%pa then applicable* — *Whether should be set aside ex debito justitiae* — *Rules of the High Court 1980 O 42 r 12*

Civil Procedure — *Irregularity* — *Waiver* — *Order for substituted service of writ wrongly granted as defendant out of jurisdiction* — *Defendant applied for leave to enter appearance and file defence* — *Whether amounted to waiver of irregular service* D

There are two appeals in this case arising out of two orders made in chambers from the same civil suit. The first appeal was against the order of the judge who upheld the registrar's decision to set aside a judgment in default of appearance dated 8 July 1986 obtained by the appellant against the second respondent, Lorrain Esme Osman ('Lorrain'), who was sued as guarantor in respect of money lent by the appellant to the first respondent. Lorrain had earlier applied by summons to set aside the default judgment and for an order that he be given leave to file an appearance and statement of defence to the appellant's claim. The registrar allowed it to be set aside and on appeal, the judge in chambers upheld the order on the grounds that: (i) the substituted service of the writ on Lorrain was bad in law because the order of substituted service itself was bad in law for the reason that the appellant should have known that Lorrain was in Britain when the writ was issued, and therefore the default judgment was also bad in law; and (ii) the default judgment was for a sum more than what was actually due. The second appeal arose from Lorrain's direct challenge of the validity of the service of the writ and, by necessary implication, for the order of substituted service to be set aside. He entered a conditional appearance for the purpose of setting aside the writ of summons and then applied to set aside the service on the ground that it was wrong in law. The registrar granted the application and on appeal to the judge in chambers, the appeal was dismissed on the ground that the order of substituted service was bad in law and, therefore, the consequent service was also bad in law. The appellant appealed. E

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- A **Held**, dismissing the first appeal and allowing the second appeal:
- (1) The order of substituted service of the High Court must be obeyed save in a few exceptions and its validity can only be challenged by proceedings instituted for the very purpose. It cannot be challenged collaterally in other proceedings. Here, the judge had obviously considered the validity of the order of substituted service when it was not a subject matter of an application for its discharge and made the error of adjudicating on its validity in proceedings which were not filed for the purpose of setting aside the order or service in pursuance thereof. It was immaterial that the order was actually made by the registrar and not a High Court judge as the registrar should be considered notionally to be making the order as a deputy High Court judge.
- (2) However, the default judgment *ex facie* showed such a larger sum in regard to the interest of 18%pa from date of judgment to date of satisfaction when the then applicable O 42 r 12 of the Rules of the High Court 1980 only allowed for the maximum rate of only 8%pa on a judgment debt. For this reason alone, the default judgment ought to be set aside *ex debito justitiae*.
- (3) It is an established principle that if a writ cannot be served personally at the time when it is issued, there cannot subsequently be any substituted service of the writ. However, if a person becomes aware of an irregularity of service and subsequently takes a further step in the action which could only be useful if the service had been good, the irregularity is waived. As Lorrain had applied for leave to file an appearance and statement of defence, this clearly indicated that the irregularity of service was a matter of the past and was no longer an issue.
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[Bahasa Malaysia summary]

- Terdapat dua rayuan di dalam kes ini yang timbul daripada perintah yang diberikan di dalam kamar untuk guaman sivil yang sama. Rayuan yang pertama dibuat terhadap perintah hakim yang telah mengesahkan keputusan pendaftar untuk mengetepikan penghakiman ingkar kehadiran bertarikh 8 Julai 1986 yang didapatkan oleh perayu terhadap penentang kedua, Lorrain Esme Osman ('Lorrain'), yang didakwa sebagai penggerenti sejumlah wang yang dipinjamkan oleh perayu kepada penentang pertama. Sebelum itu, Lorrain telah memohon melalui saman untuk mengetepikan penghakiman ingkar itu dan untuk suatu perintah supaya beliau diberi kebenaran untuk memfailkan suatu kehadiran dan pernyataan pembelaan kepada tuntutan perayu. Pendaftar telah membenarkan perintah itu diketepikan dan atas rayuan, hakim di dalam kamar telah mengesahkan perintah itu atas alasan bahawa: (i) penyampaian ganti writ itu ke atas Lorrain adalah tidak sah di sisi undang-undang kerana perintah untuk penyampaian ganti itu sendiri tidak sah di sisi undang-undang
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kerana perayu seharusnya tahu bahawa Lorrain berada di Britain apabila writ itu dikeluarkan, dan oleh itu, penghakiman ingkar itu juga tidak sah di sisi undang-undang; dan (ii) penghakiman ingkar itu ialah untuk suatu jumlah wang yang lebih daripada apa yang sebenarnya kena dibayar. Rayuan kedua timbul daripada cabaran langsung yang dibuat oleh Lorrain terhadap kesahan penyampaian writ itu dan, melalui implikasi perlu, untuk perintah penyampaian ganti itu diketepikan. Beliau telah memasukkan kehadiran bersyarat untuk tujuan mengetepikan writ saman itu dan kemudiannya memohon untuk mengetepikan penyampiannya atas alasan bahawa ia adalah tidak sah di sisi undang-undang. Pendaftar telah membenarkan permohonan itu dan atas rayuan kepada hakim dalam kamar, rayuan itu ditolak atas alasan bahawa penyampaian ganti itu tidak sah di sisi undang-undang dan dengan demikian, penyampiannya juga tidak sah. Perayu telah membuat rayuan.

Diputuskan, menolak rayuan pertama dan membenarkan rayuan kedua:

- (1) Perintah untuk penyampaian ganti di Mahkamah Tinggi mesti dipatuhi kecuali dalam beberapa kekecualian dan kesahannya hanya boleh dicabar di dalam prosiding yang dimulakan bagi tujuan itu semata-mata. Ia tidak boleh dilawan secara sampingan dalam prosiding lain. Di sini, hakim itu telah jelas mempertimbangkan kesahan perintah penyampaian ganti itu walaupun ia tidak merupakan perkara suatu permohonan untuk pelepasannya dan telah membuat kesilapan apabila memutuskan tentang kesahannya dalam prosiding yang tidak difailkan bagi tujuan mengetepikan perintah itu atau penyampaian yang dibuat di bawahnya. Adalah tidak penting yang perintah itu sebenarnya dibuat oleh pendaftar dan bukan seorang hakim Mahkamah Tinggi kerana pendaftar seharusnya dianggap telah membuat perintah itu sebagai seorang timbalan hakim Mahkamah Tinggi.
- (2) Walau bagaimanapun, penghakiman ingkar itu menunjukkan secara *ex facie* suatu jumlah yang lebih besar berkenaan dengan faedah sebanyak 18% setahun dari tarikh penghakiman ke tarikh pembayaran walaupun A 42 k 12 Kaedah-Kaedah Mahkamah Tinggi 1980 yang berkuatkuasa pada masa itu, hanya membenarkan kadar maksima 8% setahun atas suatu hutang penghakiman. Atas alasan ini sahaja, penghakiman ingkar itu harus diketepikan secara *ex debito justitiae*.
- (3) Adalah suatu prinsip mantap bahawa jika suatu writ tidak boleh disampaikan secara peribadi pada masa ia dikeluarkan, tidak boleh terdapat penyampaian ganti writ itu. Walau bagaimanapun, jika seseorang menyedari bahawa penyampaian itu adalah di luar aturan dan kemudiannya mengambil langkah selanjutnya di dalam tindakan itu yang hanya akan berguna jika penyampaian itu adalah sah, luar aturan itu akan diketepikan. Oleh kerana Lorrain

- A telah memohon untuk kebenaran memfailkan kehadiran dan pernyataan pembelaan, ini jelas menunjukkan bahawa luar aturan penyampaian itu adalah perkara yang lepas dan tidak menjadi isu lagi.]

Notes

- B For cases on service, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 2963–3038.
For cases on judgments, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 1824–2030.
- C For cases on irregularity in civil proceedings, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 1795–1822.

Cases referred to

- Boyle v Sacker* (1888) 39 Ch D 249 (refd)
Field v Bennett (1886) 56 LJQB 89 (refd)
- D *Fry v Moore* (1889) 23 QBD 395 (folld)
Hadkinson v Hadkinson [1952] 2 All ER 567 (refd)
Pembinaan KSY Sdn Bhd v Lian Seng Properties Sdn Bhd [1991] 1 MLJ 100 (folld)
- Puah Bee Hong & Anor v Pentadbiran Tanah Daerah Wilayah Persekutuan Kuala Lumpur & Anor (Teo Keng Tuan Robert, intervener) and another appeal* [1994] 2 MLJ 601 (refd)
- E *Rein v Stein* [1892] 1 QB 753 (refd)

Legislation referred to

- Rules of the High Court 1980 O 42 r 12
- F **Appeal from:** Civil Suit No C6652 of 1985 (High Court, Kuala Lumpur)

- Rajendra Navaratnam (Azman Davidson & Co)* for the appellants.
- G *Renu Zechariah (Anad & Associates)* for the respondents.

- Peh Swee Chin FCJ** (delivering the grounds of judgment of the court):
The two appeals above-mentioned arose out of two orders originally made in chambers in the same civil suit, ie the civil suit above-mentioned. We have earlier dismissed the appeal in Civil Appeal No 02–497–92 and at the same time, we have allowed the appeal in Civil Appeal No 02–316–93 with costs in both appeals. We indicated that we would give grounds of decision and we hereby do so.
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First, we deal with Civil Appeal No 02–497–92.

- I In this appeal, the learned judge below upheld the order of the setting aside of a judgment in default of appearance dated 8 July 1986 obtained earlier by the plaintiff [the appellant] against the second defendant [the second respondent] who was sued as guarantor in respect of money lent by the plaintiff to the first defendant [the first respondent]. The

second defendant had first applied to set aside the default judgment before the learned registrar and the learned registrar had allowed it to be set aside, and on appeal, the learned judge upheld the learned registrar's order as stated above.

In the grounds of judgment of the learned judge, two main reasons were given for upholding the setting aside of the default judgment. The first reason was that the service on the second defendant by way of order for substituted service was bad in law 'because the order of substituted service was bad in law', and since the service effected in this manner was bad in law, the default judgment was also bad in law. It will be remembered that on this occasion what came up for decision by both the learned registrar and the learned judge was the setting aside of the default judgment, *inter alia*, but not the order of substituted service or service in pursuance thereof to be set aside. That this is important to bear in mind will become apparent later.

The second reason was that the default judgment was for a sum more than what was actually due, it was therefore also bad in any event.

It would be necessary to recapitulate some brief facts. On 17 October 1995, the writ of summons with a statement of claim herein was filed. On 27 November 1985, an *ex parte* summons in chambers was filed, asking for an order that the writ of summons, etc, be served by substituted service, etc, on the second defendant by posting a copy of each relevant document on the notice board of the High Court and on a conspicuous part of the last known premises of the second defendant at No 26, Jalan Kia Peng, Kuala Lumpur and also by inserting in one issue of a local newspaper. The supporting affidavit stated that two attempts were made to serve the writ of summons, etc, on 28 October 1985 and 29 October 1985 and on both occasions, 'the second defendant was not in'. Then, on 1 November 1985, the plaintiff's solicitors sent the usual letter of appointment by AR registered post that the process server would call on 6 November 1985 at about 5.30pm for serving the writ of summons, etc. Again, the process server was unsuccessful, hence the process server believed that the second defendant was trying to avoid service. The order of substituted service was then made in terms on 15 January 1986 when the application came up before the learned registrar on that day in the presence of counsel for the plaintiff, Mr Tan Leh Kiah.

The judgment dated 7 August 1986 in default of appearance was then entered as set out below:

Judgment in default of appearance

No appearance having been entered by the second defendant herein, it is this day adjudged that the second defendant do pay the plaintiff the sum of RM28,905,648.95 together with interest thereon at the rate of 18%pa from 27 August 1985 until the date of realization and it is lastly adjudged that the second defendant do pay the plaintiff legal charges and costs on a solicitor and client basis.

Dated this 8 July 1986.

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—Sgd—
Senior assistant registrar
High Court
Kuala Lumpur

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On 8 November 1990, the second defendant applied by summons to set aside the said default judgment dated 7 August 1986, and at the same time, by prayer (2), for an order 'that the second defendant be given leave to file an appearance and statement of defence to the plaintiff's claim herein'.

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In his affidavit in support, the second defendant by then incarcerated at Brixton Prison, London, deposed to the affidavits filed by the plaintiff in support of the earlier application for substituted service to the effect that the deponent was trying to avoid the service of the writ and the statement of claim when three attempts were made to serve the writ on him without success. The second defendant deposed that on 8 November 1984, he and his family had left Malaysia and that it was untrue he was trying to avoid the service. The second defendant exhibited newspaper cuttings from the *New Sunday Times* and *Sunday Star* both for the issue of 8 December 1985, wherein his arrest by the British police was reported quite prominently.

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In the same affidavit, the second defendant deposed to the said default judgment and said it was erroneous: (a) for allowing interest at 18%pa from the date of judgment to the date of realization when the prayer to the statement of claim itself claimed only 8%pa from the date of judgment to the date of realization; and (b) for allowing the plaintiff to be paid legal charges and costs on a solicitor and client basis.

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The first reason of the learned judge about the default judgment being bad was because the order of substituted service was bad which was grounded on the undisputed fact that on 8 November 1984, the second defendant and his family had left Malaysia and had never returned to Malaysia since and that on 8 November 1984, the present civil suit in the High Court was not yet even filed. The order for substituted service was bad in law because the plaintiff 'must be aware that the second defendant was already outside the jurisdiction of the courts and that the only way the service could be effected was to obtain leave of court ...'.

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For our part, with great respect we were unable to agree with the learned judge for deciding in this manner by brushing aside the order of substituted service, for the learned judge was obviously considering the validity of the order of substituted service of the High Court dated 5 January 1986 when the same order was not a subject matter of an application before the learned judge or for that matter, before the learned registrar earlier for its discharge. The order of substituted service of the High Court, a superior court of competent jurisdiction, must be obeyed by everyone save in a few and rare exceptions and it can only be challenged as regards its validity by the only way of having it set aside by proceedings instituted for the very purpose. It cannot be challenged thus collaterally in any proceedings as regards its validity save in a very few rare exceptions,

(such as a Bankruptcy Court going behind a judgment of any court on credibly raised issues of collusion, fraud, etc, only on hearing a bankruptcy petition), which all do not apply here. Please see *Pembinaan KSY Sdn Bhd v Lian Seng Properties Sdn Bhd* [1991] 1 MLJ 100; *Puah Bee Hong & Anor v Pentadbiran Tanah Daerah Wilayah Persekutuan Kuala Lumpur & Anor (Teo Keng Tuan Robert, intervener) and another appeal* [1994] 2 MLJ 601 and *Hadkinson v Hadkinson* [1952] 2 All ER 567. In this connection, it is immaterial that the said order of the High Court was actually made by the learned registrar and not a High Court judge. The learned registrar should be considered notionally to be making the order as if he were a deputy High Court judge.

With great respect, the learned judge was making a similar error as the learned judge in *Pembinaan KSY*, by adjudicating on the validity of the order of substituted service not in actual proceedings filed for the very purpose of having the order for substituted service or service in pursuance thereof set aside.

About the second reason of the learned judge in holding that the default judgment dated 8 July 1986 was in respect of a sum larger than was actually due, we were in entire agreement with it. The default judgment *ex facie* showed such a larger sum in regard to the interest of 18%pa from date of judgment to date of satisfaction when the then applicable O 42 r 12 of the Rules of the High Court 1980 (before its amendment on 12 December 1986), only allowed for the maximum rate of 8%pa on a judgment. For this reason alone, the default judgment ought to be set aside *ex debito justitiae* without the need to consider any further reason leading to the conclusion that the default judgment ought to be set aside. The learned judge could of course consider the validity of the default judgment itself as it was coming up in a proceeding instituted for the very purpose of having it set aside.

We, therefore, dismissed the appeal with costs in Civil Appeal No 497-92.

We now give our reasons for allowing the appeal in Civil Appeal No 02-316-1993.

This arose out of a proceeding to challenge directly and not collaterally, the validity of the service pursuant to the order of substituted service, by asking for the service of the writ on the second defendant to be set aside; and by the inevitable and necessary implication, for such order of substituted service to be itself set aside.

The second defendant had on 25 May 1992, entered a conditional appearance for the purpose of setting aside the writ of summons.

On 29 May 1992, after such conditional appearance, the second defendant filed an application to set aside such service on the ground it was wrong in law. The learned registrar heard the application, granted it in terms as prayed. On appeal to the judge in chambers, the appeal was dismissed. The ground of the learned judge was that such an order of

- A substituted service was bad in law and the consequent service in pursuance thereof was also bad in law.

The learned judge took it apparently for granted that the writ of summons itself was not bad, and we would agree with it, for even though the second defendant was out of jurisdiction at the time of the issue of the writ, 'the plaintiff might have kept it with the view of serving it on the defendant if he should come within the jurisdiction', per Lindley LJ in *Fry v Moore* (1889) 23 QBD 395. In this connection, it is interesting to observe that by entering a conditional appearance, in any event, the second defendant would then have been deemed to have submitted to the jurisdiction of the court — subject to the right to apply to set aside the writ or service of the writ.

- C We agreed, however, with the learned judge that the service and also order of substituted service were bad in law; they were irregular for the following reason. There is an established old principle that if a writ cannot be served personally at the time when the writ is issued, there cannot subsequently be any substituted service of the same writ, see *Fry v Moore* and *Field v Bennett* (1886) 56 LJQB 89. But this was not the end of the matter, the question of waiver was raised and argued by the plaintiff.

- D It was pressed in argument that prior to this application on 29 May 1992 to set aside service in question, in fact about 1½ years earlier, the second defendant had applied by summons dated 8 November 1990 before the learned registrar, for two prayers, the first being the setting aside of the said default judgment, as dealt with earlier, and the second prayer being: 'that the second defendant be given leave to file an appearance and statement of defence to the plaintiff's claim herein'. The order thereon was not extracted or put in the appeal record, but on appeal to the learned judge only the issue of setting aside the default judgment was taken. We suppose nobody felt it necessary or relevant then for the order on the second prayer to be taken or argued.

- E It was pressed in argument that prior to this application on 29 May 1992 to set aside service in question, in fact about 1½ years earlier, the second defendant had applied by summons dated 8 November 1990 before the learned registrar, for two prayers, the first being the setting aside of the said default judgment, as dealt with earlier, and the second prayer being: 'that the second defendant be given leave to file an appearance and statement of defence to the plaintiff's claim herein'. The order thereon was not extracted or put in the appeal record, but on appeal to the learned judge only the issue of setting aside the default judgment was taken. We suppose nobody felt it necessary or relevant then for the order on the second prayer to be taken or argued.
- F But now it was raised in connection with the present application to set aside the writ and service, that prayer (2) had amounted to a waiver of any irregularity of service on the second defendant. *Fry v Moore* was cited as the authority. In *Fry v Moore*, the facts were, on material points, similar. When the writ there was issued, the defendant was out of jurisdiction. A motion (without entering a conditional appearance, be it noted) was taken out for service to be set aside; the Court of Appeal there subsequently held that the defendant there had taken such further steps in the action 'which would only be proper steps on the theory that the order of substituted service was a proper order'. The steps referred to and taken by the defendant were in applying for an order for the plaintiff to deliver a statement of claim (the writ was presumably not indorsed with a statement of claim). Lindley LJ further held to the effect that by such application, the action was treated by the defendant there as a properly constituted action, 'the object being to enable the defendant to raise a defence on the merits', and therefore the irregularity of the order of the substituted service had been waived, and the impugned service was upheld.

A person cannot approbate and reprobate, so that if a person becomes aware of an irregularity of service and then subsequently takes a further step in the action which could be only useful if the service had been good, the said irregularity is waived. See also *Rein v Stein* [1892] 1 QB 753 and *Boyle v Sacker* (1888) 39 Ch D 249. We are in entire agreement with the decision in *Fry v Moore*. The second defendant had asked for leave to file an appearance and to file a statement of defence, clearly indicating that he wanted to go into the fray in full swing and that the matter of irregular service was a matter of the past; no longer an issue.

Testing the second prayer in the application dated 8 November 1990 in another way, could the said prayer in question be a step merely to assert the objection: (a) that the service was irregular; or (b) that the said default judgment was wrongly entered? A negative answer would be apparent to these questions on reflection. The argument of waiver would still hold good.

We have, therefore, held that the irregularity of the service was waived, in other words, the service of the second defendant was valid.

For the reasons stated, we allowed the appeal with costs.

First appeal dismissed; second appeal allowed.

Reported by Prof Ahmad Ibrahim

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